No. 93-1906

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE TUXEDO UNION FREE SCHOOL DISTRICT, et al.,

Petitioners,

—v.—

BRIAN CULLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent's brief in opposition distorts the controlling facts and attempts to obscure the issues actually presented by arguing a case that is not before the Court. The mere repetition of inapplicable First Amendment principles will not make them relevant to Respondent's knowing and deliberate violation of directives from School District and law enforcement authorities to cease electioneering at locations clearly within a statutorily prescribed campaign-free zone. "Putting the wrong questions," moreover, "is not likely to beget right answers even in law."[1]

Equally important, the brief in opposition in no way addresses the important state interests at stake here. Like the decision below, it is remarkable for its apparent indifference to the principles that animate the Abstention Doctrine articulated by this Court in *Younger v. Harris*, 401 U.S. 37 (1971) ("*Younger*"). Respondent says not a word, for example, about the New York State tenure statute, the important purposes that it is intended to serve or the protections that it embodies for tenured teachers.[2] *See* Petition for a Writ of Certiorari ("Petition") at 2-3 and 29-30; *see also* Brief *Amicus Curiae* of New York State School Boards Association, Inc. in Support of Petition for Writ of Certiorari. Nor does he even purport to address the potential consequences of the decision below in terms of local autonomy in the management of school district affairs and the ability of school districts to carry out their critically important function through a competent body of teachers able and willing to meet high standards of conduct.

Respondent's rhetoric and the district court's "[p]resum[ed]" findings (13a) notwithstanding,[3] the decision of the panel majority below is simply irreconcilable with *Younger* and its progeny. If it is allowed to stand without review, resort to the federal courts by teachers (indeed, by public employees generally) seeking to avoid disciplinary proceedings will be limited only by the creativity of

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1 *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 170 (1946) (Frankfurter, J., concurring).

2 N.Y. Educ. Law § 3020-a (McKinney 1981) ("Section 3020-a").

3 The pages of the Appendices to the Petition are referred to as "__a."

counsel and will surely threaten to swallow the rule of *Younger*, with all that entails for the compelling considerations on which the Abstention Doctrine is based.

Similarly, Respondent dismisses the implications of the decision below for the election laws of dozens of states (*see* Petition at 20-21) by stating that he "never challenged the facial validity of any election law that lacks a requirement to post markers." (Resp. Br. at 14) That assertion misses the point. Respondent contends that a campaign-free zone in the vicinity of a polling place is constitutionally impermissible in the absence of "objective," "uniform" and "continuous" notice to the public (Resp. Br. at 13-20) in the form of distance markers or "a designated monitor throughout the day" (Resp. Br. at 15). It is precisely that contention, adopted by the panel majority below, that calls into question the constitutionality of election laws in as many as 26 states—which by their terms require neither distance markers nor a "designated monitor."

The Controlling Facts Corrected

Given Respondent's treatment of the record, the uncontroverted facts underlying this case bear emphasis.

- o The disciplinary penalties previously imposed on Respondent for violation of established policy and insubordination were not imposed on him by the School District.
  - — They were imposed by unanimous impartial state administrative panels convened pursuant to Section 3020-a and, in the latter case, by the New York State Commissioner of Education as well. (Petition at 4-5)
- o The School District made no effort whatsoever to prevent Respondent from electioneering or from distributing the flier that protested the election.
  - — The School District merely directed Respondent to carry out his activities outside the 100-foot campaign-free zone mandated by statute. (Petition at 6-9)
  - — As the Section 3020-a panel stated, "the directives of the District and Board officials were not intended to, and did not in fact, prevent Respondent from expressing his opinion." (48a)
- o The School District did not bring charges against Respondent for electioneering.

- The charges were for "misconduct and/or conduct unbecoming a teacher and/or insubordination" consisting of three instances of electioneering at locations that Respondent knew to be within 100 feet of the polling place, *after* he received notice not only from School District authorities, but also from the police that such electioneering was unlawful. (Petition at 9)

o There is absolutely no evidence that the School District "knowingly" (Resp. Br. at 21) failed to post distance markers on the day of the election.

- Indeed, it was stipulated below that although the Handbook for School Board Members consulted by the Superintendent before the election contained the prohibition on electioneering within 100 feet of the polling place, it was "silent concerning the placement of distance markers." (33a)

o The School District's enforcement of the Section 2031-a[4] prohibition was *not* "selective" or "subjective" (Resp. Br. at 3); nor did the School District exercise any "discretion" (*id.*) in enforcing it.

- Section 2031-a prohibits only electioneering "in a public manner." (53a-54a)
- And, there is no evidence that anyone other than Respondent violated the electioneering prohibition or that the School District failed to respond to any report of such a violation. (Petition at 27; 17a)[5]

Finally, when the courts below intervened, the disciplinary charges against Respondent were before an impartial state panel convened pursuant to Section 3020-a, which has been described as

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[4] N.Y. Educ. Law § 2031-a (McKinney 1988) ("Section 2031-a").

[5] Among the more egregious of Respondent's misleading assertions is the statement—repeated in various forms throughout the brief in opposition—that the polling place opened "early that morning" (on May 6) and was not monitored until Respondent began his illegal electioneering at 3:30 p.m., "a span of some nine hours or so." (Resp. Br. at 11) That assertion is not only without support in the record but also flatly untrue. In fact, the polling place did not open until 2:00 p.m., shortly before Respondent began to electioneer.

a "bulwark[] of [the] tenure system" that "protects tenured teachers from arbitrary suspension or removal." *Holt v. Board of Educ.*, 422 N.E.2d 499, 502 (N.Y. 1981). Determinations by such panels are subject to review by the Commissioner of Education and by the New York State courts. (Petition at 3 and n.3)

It is in this context that the issues raised by the Petition should be considered.

The Abstention Issue Restated

1. The threshold issue here is whether the courts below properly intervened in the pending state proceeding to decide the federal constitutional question raised by Respondent rather than abstaining and leaving that question for the New York State courts in the first instance (assuming that the question remained in the case after decision of any state issues presented). Under decades of settled authority, the answer is that the courts below plainly erred.

The exceptions to the Abstention Doctrine articulated in *Younger* are "extremely limited." *Younger*, 401 U.S. at 56 (Stewart, J., concurring); *see also Perez v. Ledesma*, 401 U.S. 82, 85 (1971) ("[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction . . . is federal . . . relief against pending state prosecutions appropriate"); and cases cited at pp. 22-24 of the Petition. Respondent concedes, for example, that, "[i]n the context of the *Younger* doctrine, 'bad faith' generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." (Resp. Br. at 21)

Here, in contrast, there is no basis in the record or in law for any conclusion that the disciplinary charges against Respondent were brought without a reasonable expectation that they would be upheld. To the contrary,

- There was (and is) no reported decision holding, or even suggesting, that Section 2031-a may not be enforced in the absence of distance markers;
- The Section 3020-a panel convened to hear the charges against Respondent concluded that "the placement of distance markers . . . was not a condition precedent to application of the electioneering prohibition" (48a); and
- Judge Amalya L. Kearse agreed. (17a)

Nor can the district court's "findings" with respect to bad faith be justified on any other basis.[6] Its "apparent conclusion" (13a) that the charges were in retaliation for the exercise of Respondent's right to protest the school board elections is based solely on the erroneous view that the School District could not have had a reasonable expectation that the charges would be found valid.[7] As to the "specific finding . . . of 'animus'" relied on by Respondent (Resp. Br. at 22), it was based on the "charges and hearings and imposition of fines" that preceded the Section 3020-a proceeding enjoined by the courts below. (13a) As demonstrated in the Petition (at 25-26), that rationale for the conclusion of bad faith is a virtual parody of settled law. Multiple prosecutions brought without hope of success may justify a federal court's intervention in state proceedings. *See* Petition at 23-24 n.30 and 25-26. It was plain error, however, for the courts below to rely on *valid* disciplinary charges as evidence of "animus" or "bad faith" by the School District.

2. Respondent cites no authority to the contrary. Nor can he contend that the circumstances here even remotely resemble those presented in any other case in which there has been a finding of "bad faith" for purposes of the *Younger* doctrine. Indeed, the abstention decisions relied on by Respondent well illustrate the error

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[6] Contrary to Respondent's contention (Resp. Br. at 23), *de novo* review of the decision below on the abstention issue is appropriate. In similar circumstances, this Court has engaged in an independent examination of the facts alleged and evidence proffered by the party seeking an exception to the *Younger* doctrine. *See, e.g., Moore v. Sims*, 442 U.S. 415, 432-35 (1979) (conducting independent review of record to determine applicability of exception to *Younger*); *Hicks v. Miranda*, 422 U.S. 332, 350-51 (1974) (reviewing *de novo* the district court's findings with respect to bad faith); *Perez v. Ledesma*, 401 U.S. 82, 85 (1971) (conducting plenary review of record with regard to bad faith); *see also Cameron v. Johnson*, 390 U.S. 611, 619-20 (1967); and *Dombrowski v. Pfister*, 380 U.S. 479, 485-87 (1965).

[7] According to the district court, the "disciplinary charges were brought in bad faith . . . *since [Respondent] could not be found to have violated the law because there were no markers there*"; and the "disciplinary charges would not have been brought except for the content of the pamphlet, *since it's clear without a posting there was no violation.*" (26a; emphasis added)

of the panel majority decision below. *See, e.g., Lewellen v. Raff*, 843 F.2d 1103 (8th Cir.) (approving a temporary injunction based *inter alia* on allegations of "pervasive racism and discriminatory treatment of blacks" in court system and direct evidence of retaliatory motive), *reh'g denied*, 851 F.2d 1108 (8th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *Wichert v. Walter*, 606 F. Supp. 1516, 1521-22 (D.N.J. 1985) (declining to abstain where charges were brought "only for the purpose of harassment and retaliation, *with no hope of eventual success*") (emphasis added).[8]

3. It is not true that "[r]egardless of any state court interpretation of Section 2031-a, the federal constitutional question at bar remains." (Resp. Br. at 21-22) If a state court were to determine, as a matter of statutory construction, that the posting of distance markers is a precondition to enforcement of Section 2031-a—a question on which the New York State courts have not yet opined—then the federal constitutional question raised by Respondent would be moot. Alternatively, the Section 3020-a panel, the Commissioner of Education or a New York State court could determine that, in the circumstances presented, Respondent's conduct did not constitute "misconduct and/or conduct unbecoming a teacher and/or insubordination" (69a-71a) within the meaning of the Education Law. By virtue of the intervention of the courts below, however, both the federal and state courts were deprived of the "opportunity

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[8] Respondent also relies on *Lewellen v. Raff* for the proposition that a prosecution in retaliation for the exercise of constitutional rights "'will justify an injunction regardless of whether valid convictions conceivably could be obtained.'" (Resp. Br. at 21) As noted in the Petition, however, in a later decision in *Lewellen*, the Eight Circuit pointed out that the district court had found a substantial likelihood that the plaintiff "would establish that the prosecutor 'had no reasonable expectation of getting a conviction.'" 851 F.2d at 1110. In that later decision, the Eighth Circuit also cited with approval *Smith v. Hightower*, 693 F.2d 359, 369 (5th Cir. 1982), which specifically held "that it is erroneous for a district court to refuse to consider evidence as to whether the prosecutors entertained a reasonable expectation of obtaining a conviction." 851 F.2d at 1109. *Smith v. Hightower* was decided after the Fifth Circuit decisions relied on by Respondent. In *Wilson v. Thompson*, 638 F.2d 799, 801 (5th Cir. 1981), moreover, the Fifth Circuit ultimately concluded after remand to the district court that bad faith "played no role" in the decision to prosecute.

for narrowing constructions [of state law] that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims*, 442 U.S. 415, 429-30 (1979).

The So-Called "Due Process" and "Equal Protection" Concerns

1. Respondent's repetition of the phrases "narrowly tailored" and "least restrictive means" (Resp. Br. at 13-15)—albeit without citation to any relevant authority—ignores that this Court has already upheld as constitutionally valid a prohibition on electioneering within 100 feet of a polling place. *Burson v. Freeman*, 112 S. Ct. 1846 (1992). The School District's use of oral notice to communicate the restriction set forth in Section 2031-a made it no less "narrowly tailored" and no more "restrictive" than the electioneering prohibition approved in *Burson*.

In any event, the short answer to Respondent's "due process" argument is that there was notice here and that it was objective. Respondent concedes that he himself had adequate notice of the restriction on electioneering. (Resp. Br. at 9) There is no question, moreover, as to any subjectivity in the School District's enforcement of Section 2031-a. "During each incident forming the basis of the charges, [Respondent] was situated within 100 feet of the front doors of the High School." (39a)

Respondent's "equal protection" argument is similarly flawed. Illustrative is his assertion that

> [i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by selective enforcement of an extremely broad prohibitory statute.

(Resp. Br. at 19, quoting *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965)) That is a statement with which it is difficult to disagree. It is also a statement, however, that has no application here.

On the record before this Court, there has been no determination whatsoever by the School District as to what expressions of view will or will not be permitted; nor has there been any selective enforcement. There may or may not have been "opportunity" for abuse. (Resp. Br. at 20) Indeed, there would be "opportunity" for

abuse even if distance markers were posted and even if "someone continuously monitor[ed] the area." (Resp. Br. at 20) Clearly, however, there is no evidence in this record of selective enforcement or any other abuse.

2. As pointed out in the Petition, the contention that there is a First Amendment right to electioneer at precisely 100 feet from a polling place was implicitly rejected by this Court in *Burson v. Freeman* and expressly rejected by the Fifth Circuit in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1396 (1994). Accordingly, Respondent now says that he has "never made the frivolous argument that [requiring him to electioneer at] any distance greater than 100 feet [from the polling place] would be violative of his right to free political speech." (Resp. Br. at 16-17)

Instead, unable to argue that his own First Amendment rights were violated, Respondent asserts the rights of unidentified others. Thus, he contends that "*members of the public* are entitled to know where their speech is prohibited and where it is not" (Resp. Br. at 17; emphasis added); and that the School District's method of enforcement "risked causing *citizens* to 'steer far wider of the unlawful zone' than necessary thereby inhibiting the lawful exercise of the fundamental First Amendment right to express political speech" (Resp. Br. at 18; emphasis added).[9]

These assertions might be relevant if made in the context of a challenge to the facial validity of Section 2031-a or if made by persons charged with violating the statute due to a lack of notice. But here, Respondent "has never argued that he personally did not receive notice." (Resp. Br. at 9) As noted in the Petition, moreover, whatever the scope and complexity of the doctrine that governs facial challenges to state laws (*e.g.*, *Lakewood v. Plain*

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[9] Respondent's invocation of the rights of "members of the public" is particularly inappropriate given that the state proceeding at issue is a disciplinary one brought against him in his capacity as a public employee based upon standards set forth in the Education Law and in the Teacher Handbook for the District. (Petition at 9 n.16) *See, e.g., Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994) ("[T]he government as employer indeed has far broader powers than does the government as sovereign. . . . [E]ven many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees.").

Dealer Publishing Co., 486 U.S. 750 (1988)), it is clear that this case does not involve a facial challenge to Section 2031-a of the Education Law.[10] Thus, Respondent's hypothetical lack of notice argument should be rejected, for his conduct was squarely and admittedly within the statutory prohibition and the disciplinary charges were based solely on conduct engaged in after he admittedly had notice of that prohibition. *See Parker v. Levy*, 417 U.S. 733, 756 (1974) and other cases cited at pp. 18-19 of Petition.

3. It is sophistry for Respondent to contend that the School District's enforcement of the Section 2031-a prohibition "did nothing to advance the compelling state interest in maintaining the integrity of the electoral process." (Resp. Br. at 8) That enforcement was designed to prevent only such intrusions on the integrity of the electoral process as were prohibited by statute and, so far as the record disclosed, it was aimed at all such intrusions that occurred or were threatened.[11] To the extent that the School District's enforcement of the statute was unsuccessful in preventing such intrusions, it is because Respondent refused to abide by explicit directives to cease electioneering at prohibited locations.

4. Much of Respondent's argument is premised on the assumption that Section 2031-a was "selectively" enforced by the School District. That assumption, properly characterized by the dissent below as "purely speculative" (17a), is without support in the record. What Respondent objects to is not selective enforcement, but passive enforcement.

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[10] Virtually all the decisions relied on by Respondent (in Point II of his brief) in support of his "due process"/"equal protection" theory involve *facial* challenges to statutory restrictions on speech. The only decisions that involve "as applied" challenges are *Brown v. Louisiana*, 383 U.S. 131 (1966), and *Cox v. Louisiana*, 379 U.S. 536, which have no application whatsoever here.

[11] In light of *Burson v. Freeman*, it is not incumbent upon the School District to show that every application of Section 2031-a is necessary in order to serve the compelling state interest that underlies the statute. Indeed, in *Burson* itself, the plurality observed that, "because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." 112 S. Ct. at 1856.

Yet, Respondent does not address (or even acknowledge) this Court's holding in *Wayte v. United States*, 470 U.S. 598, 608 (1985), which validated a passive enforcement policy as constitutional unless the party alleging selective enforcement shows "both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." Respondent has shown neither; nor has he provided any legal authority for his attempt to shift to the School District the burden of showing an absence of selective enforcement. Here, as in *Wayte v. United States*, and in *Cameron v. Johnson*, 390 U.S. 611 (1967), in the absence of evidence that the School District permitted anyone to electioneer within the prohibited zone (let alone to electioneer there after receiving notice of the statutory restriction), Respondent's legal theories based on speculation regarding "selective enforcement" should be rejected.

CONCLUSION

For the reasons stated above and in the Petition, we urge that the decision below be summarily reversed in light of *Younger v. Harris* and its progeny. In the alternative, we urge that the Petition be granted and the case set for plenary review.

Respectfully submitted,

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